

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF NATUAL RESOURCES

In the Matter of the Alteration of a  
Cross-Section of Spring Creek by Elden  
and Dorothy Brant Without a Permit from  
the Commissioner of Natural Resources

**FINDINGS OF FACT,  
CONCLUSIONS, AND  
RECOMMENDATION**

The above entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on November 18, 19, 23, and 29, 1999, at the Office of Administrative Hearings, 100 Washington Avenue South, Suite 1700, Minneapolis, Minnesota. On November 22, 1999, a view of site of Spring Creek near Hinkley, Minnesota, was conducted and a session of the hearing was conducted at the Hinkley City Hall. The record was closed upon adjournment of the final day of hearing on November 29, 1999.

Peter L. Tester, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, MN 55101-2127 appeared on behalf of the Department of Natural Resources. Paul R. Haik, Krebsbach & Haik, LTD., 701 Fourth Avenue South, Suite 500, Minneapolis, MN 55415-1631 appeared on behalf of Elden and Dorothy Brant.

This report is a recommendation, **not** a final decision. The Commissioner of Natural Resources will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions and Recommendations contained herein. Pursuant to Minn. Stat. §14.61, the final decision of the Commissioner of Natural Resources shall not be made until this report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by the Report to file exceptions and present argument to the Commissioner of Natural Resources. Parties should contact Allen Garber, Commissioner of Natural Resources, 500 Lafayette Road, St. Paul, Minnesota 55155-4040, telephone 651-296-2549, to ascertain the procedure for filing exceptions or presenting argument.

**STATEMENT OF ISSUES**

1. Whether the excavation of two wildlife ponds adjacent to Spring Creek by Mr. Brant changed the course, current, or cross-section of the creek.
2. Whether Mr. Brant's excavation required a permit from the Department and whether Mr. Brant had such a permit.

3. Whether the Brants have demonstrated that restoration of Spring Creek should not be required.

Based upon the record herein, the Administrative Law Judge makes the following:

### **FINDINGS OF FACT**

1. Eldon Brant is a retired farmer whose farm is in Pine County, Minnesota. He had also worked at times doing road construction. In 1996, he and his wife bought another piece of land, the land in question here, which will be referred to as the "Brant Property." It is a 118 acre piece of mostly farmland that had been in Dorothy Brant's family for a many years. It is about two miles east and one mile north of Hinkley, Minnesota, in Section 17 of Barry Township (T 41 N, R 22 W) in Pine County.<sup>[1]</sup> The Brants have recently sold the Brant property to their son and his children, but that does not affect this proceeding.

2. Spring Creek, sometimes referred to as Spring Brook, runs through the Brant Property from west to east. It is a spring fed, cold water stream that arises in Section 18 about a mile west of the Brant property, then flows southeasterly through Section 17 and 16, then southerly into Section 21, where it turns northeast and joins the Grindstone River. Its total length is 6.3 miles.<sup>[2]</sup> Spring Creek has been a "designated trout stream" since 1950 and is currently listed as such in Minn. Rule 6264.0050, subp. 4 JJ. It is on the DNR Inventory of Protected Waters and Wetlands for Pine County issued January 7, 1985.<sup>[3]</sup> It is one of several designated trout streams in Pine County.<sup>[4]</sup>

3. The west edge of the Brant Property is the west line of Section 17 and the east edge is the section quarter line 1320 feet to the east.<sup>[5]</sup> About 100 feet or so from the east line is a culvert under a farm road. Spring Creek flows through the culvert, which has been called a dam or bridge #2 on some of the DNR surveys of Spring Creek. The culvert is 4.9 miles from the mouth of the creek where it joins the Grindstone River.<sup>[6]</sup> The length of Spring Creek across the Brant Property appears to be roughly 1400 feet.

4. The culvert has been in place for many years. Its height and the fact that it slopes to the west caused the creek to backup at that point and to form a pool to the west. Depending upon moisture conditions, the pool varied from about 10 feet across to as wide as 40 feet across.

5. DNR has managed Spring Creek for trout for many years. No trout have ever been found or reported in the upper half of the creek and DNR's surveys have generally said that only the lower two miles are capable of maintaining a brook trout population.<sup>[7]</sup> Moreover, because of problems such as beaver dams and a lack of resources, DNR has sometimes considered Spring Creek to be a marginal resource better suited to the taking of minnows.<sup>[8]</sup> Nonetheless, maintenance of a trout stream requires that upstream reaches and tributaries also be managed in order to protect the downstream trout populations. The entire stream is an inter-related system and the temperature, contents, life forms, and other characteristics of the upstream reaches affect the trout and

other life forms in downstream reaches. Thus, DNR has continued to manage the entire length of Spring Creek for brook trout.<sup>[9]</sup>

6. Until the 1997 excavation discussed below, as Spring Creek flowed through the Brant Property, it was generally one to three feet wide, a few inches deep, and fed by ground water along its length. The creek meandered only slightly and its banks were covered with over-hanging grasses, "heavy willow-brush type," alder, and sedge.<sup>[10]</sup> The eastern end near the pool by the culvert was less brushy than the west and more like the mostly grass and sedge area just east of the culvert.<sup>[11]</sup> Some areas north and south of the creek had been grazed in prior years, but had grown up with grasses by 1997.

7. Mr. Brant decided that he'd like to build a wildlife pond on the property on the north side of Spring Creek on the end near the culvert. He called Pine County to find out what he had to do. He was told to file a notice with several agencies and to obtain a grading and filling permit from the county.

8. Since 1991, federal, state, and local agencies have used a combined project notification form to be used by anyone proposing a project that affects waters or wetlands. It is to be sent to the DNR, the Army Corps of Engineers, and the local unit of government. According to the form, those agencies will then advise the applicant of their jurisdiction and of any permit requirements.<sup>[12]</sup> On September 24, 1996, the Brants completed the Project Notification Form and sent copies to the DNR Regional Office, the Corps of Engineers, Pine County, and perhaps the township or soil and water conservation district. The form described the project as excavation of two acres adjacent to Spring Creek to make a wildlife pond.<sup>[13]</sup>

9. The Project Notification Form was received by the DNR's Cambridge Regional Office on September 25, 1996.<sup>[14]</sup> Mike Mueller, the Area Hydrologist, reviewed it.

10. DNR experts, including Mr. Mueller, do not favor locating wildlife ponds close to trout streams, which are cold water streams. The principal reason for this is that ponds have a thermal impact on the streams and trout are very sensitive to higher water temperatures. Water in trout streams, being fed by cool groundwater and moving rapidly through shaded stream beds, remains cool along its run or actually becomes cooler by the addition of more groundwater. But water standing in ponds is warmed by the sun. Ponds within streams caused by natural or manmade dams have very direct impacts upon the streams. But even ponds located at some distance from the streams and not directly connected have an impact because of the movement of warmed groundwater through and from the ponds and into the streams. There may also be loss of water from a stream to a nearby pond, depending upon elevations. Also, because ponds are stagnant or slow flowing, they support different life forms than rapid flowing cold water streams. For example, algae may form. Among other impacts, that can result in lower dissolved oxygen levels. If the pond is in or connected to the stream, potentially harmful chemicals, plants and animals will enter the stream. Finally, streams are not static; their channels change over time to different locations, depending upon soil type, shape of the channel, and other

factors.<sup>[15]</sup> Thus, some allowance must be made for the natural course changes of such streams over time.

11. Despite the known affects of placing ponds where they can harm trout streams, DNR has no specific rule prohibiting the practice or establishing excavation setback requirements.

12. It was unclear to Mr. Mueller from the notice just how close to Spring Creek Mr. Brant intended to dig his pond. But Mr. Brant called that day, spoke with Mr. Mueller, and described the project to him. Mr. Mueller told Mr. Brant that no DNR permit was required, but that he should keep the pond at least 50 feet back from the stream. Mr. Brant said that that wouldn't leave him much room, so then Mr. Mueller told him he could stay back just 25 feet.<sup>[16]</sup>

13. Mr. Mueller then sent the Brants a form letter that he uses in such situations, with a modification. It stated, in relevant part:

The Department of Natural Resources (DNR) has received your project notification for the proposed wildlife pond. The project will affect a wetland located in Section 17, Township 41 North, Range 20 West, Pine County. Based on our review of the notification form, maps, and other project materials, we have determined that the wetland is not under DNR permit jurisdiction and therefore the project does not require a DNR permit provided excavation is not connected to Spring Creek.<sup>[17]</sup>

The modification Mr. Mueller made to the standard letter was to add the phrase, ". . . provided excavation is not connected to Spring Creek." Mr. Mueller sent copies of the letter to the Pine County SWCD; Pine County Zoning, and the Corp of Engineers. On the copy to the Pine County Zoning Department, he added a handwritten note to the Kelly Osterdyk, the Zoning Technician there, saying, "This is pretty close to stream. Need G & F [Grading and Filling] approval."<sup>[18]</sup>

14. Mr. Osterdyk received the Project Notification Form and his copy of Mr. Mueller's letter. He went out to the site to view the property. On October 11, 1996, he sent the Brants a letter saying that they would have to obtain a Grading and Filling permit because it was required under the county's Shoreland Management Ordinance<sup>[19]</sup> for the movement of more than ten cubic yards of material within 75 feet of Spring Creek, a "tributary - trout stream." He enclosed an application form and a Township Acknowledgement form, all to be completed and returned with a \$50 permit fee.<sup>[20]</sup>

15. On October 30, 1996, the Corps of Engineers wrote Mr. Brant stating that his work was authorized by an existing General Permit and that unless another state or federal agency objected, he could proceed with the project.<sup>[21]</sup>

16. On November 5, 1996, the Brants submitted their Application for Grading and Filling Permit and \$50 fee to the Pine County Zoning Department.<sup>[22]</sup> The application included a crude drawing of the project. It showed the excavation to be 400 feet long, 100 feet wide, four feet deep, bounded on the north by an embankment, and bounded on the south by Spring Creek. It showed no land between the creek and the

excavation. It showed the roadway that passes over the culvert on the east side and states that approximately 6,000 cubic yards would be excavated. It did not show the location of the existing pool by the culvert.

17. Mr. Osterdyk reviewed the application and spoke with Mr. Brant at some point, probably in conjunction with Richard Noyes of the Pine County Soil and Water Conservation District. They told him not to dig in Spring Creek. Mr. Osterdyk did not confer with Mr. Mueller.

18. On November 12, 1996, Mr. Noyes wrote Mr. Brant a letter on behalf of the SWCD recommending leveling of the excavated soil and planting of certain grasses.<sup>[23]</sup> On November 13, 1996, upon Mr. Osterdyk's approval, the County Zoning Administrator issued a Grading and Filling Permit to the Brants for the project.<sup>[24]</sup>

19. It was not until September of 1997 that Mr. Brant started the excavation of the wildlife pond. He hired Jim Irons, a local excavator, to dig the pond. He told Mr. Irons to dig out the pond on the north side of Spring Creek and not to dig in the creek. Mr. Irons used a large backhoe to dig out the pond along the north side of the creek. He tried to stay three or four feet from the stream, but at times he got closer than that. At least twice the stream bed pulled away with all the interlocking roots and vegetation. Mr. Irons would then push material back into the break. He dredged out a pond on the north side about 480 feet long and 30 to 150 feet wide along the creek.<sup>[25]</sup> Mr. Brant was there at times during the excavation and at times he was not.

20. After the pond on the north side was completed, Mr. Brant told Mr. Irons to dig another pond on the south side of the creek because he thought it would look nice. They thought that could be justified because they hadn't removed 6,000 yards yet. So Mr. Irons dug a pond on the south side of the creek that runs from the same starting point on the west to the culvert on the east, a distance of about 400 feet. The south pond was about 60 feet wide.<sup>[26]</sup> Unlike the north side, Mr. Irons left several feet of creek bank between the south pond and the stream, at least near west end.<sup>[27]</sup>

21. Checking to see if the work had ever been done, Mr. Osterdyk visited the site on September 19, 1997, while Mr. Irons was in the process of digging the south pond. He told Irons that the work seemed to exceed the permit in that the north creek bank had been partially removed and there was a pond being dug on the south. Mr. Irons told Mr. Osterdyk that he tried to save as much of the creek bank as possible, but that clumps of the bank came out as he was digging. On September 24, 1997, Mr. Osterdyk spoke with Mr. Mueller about what he had found.<sup>[28]</sup>

22. On September 29, 1997, Mr. Mueller inspected the site with Conservation Officer Pete Jensen. At that time, the ponds appeared essentially as one large pond with a narrow peninsula of land extending three hundred feet or so into the middle of the pond from the southwest end along the former creek bed.<sup>[29]</sup> The north and south ponds were connected at the east end in the area of the former pool by the culvert. Spring Creek flowed a ways on to the peninsula and then over the north side into the pond. Today the stream flows into the north pond at a point about 40 feet from the west

end,<sup>[30]</sup> but at the time of Mr. Mueller's observation, it stayed in its banks several feet further, about 90 feet up the peninsula<sup>[31]</sup>. The banks around the ponds were still freshly scraped soil and spoil piles of the excavated materials remained around the site at various locations.<sup>[32]</sup> The water level in the ponds was six to 12 inches lower than the level of the stream as it entered the peninsula.

23. On October 23, 1997, Mr. Mueller wrote Mr. Brant a letter stating that he had inspected the property with Officer Jensen, had observed that excavation had occurred in the channel of Spring Creek and that the ponds were excavated to within several feet of the edge of the stream along several hundred feet of its length. He stated Spring Creek was a public water and a designated trout stream, that Minn. Stat. § 103G.245 required a permit for the alteration of public waters, that Mr. Brant did not have a permit to excavate in Spring Creek, that he had written him that no DNR permit was required provided the excavation did not connect to the creek, and that he had advised him to maintain a 25 foot buffer in a phone conversation. Mr. Mueller went on to state that since Mr. Brant's actions constituted a misdemeanor, he was referring it to the Conservation Officer for action and that apart from that the DNR might investigate and issue a restoration order. Finally, he offered Mr. Brant an option of voluntarily restoring the bed of Spring Creek to a width of 75 feet on both sides of the original stream bed.<sup>[33]</sup>

24. Conservation Officer Jensen then issued a Summons and Complaint to Mr. Brant charging him with a misdemeanor violation of Minn. Stat. § 103G.141 for altering public waters without a valid permit.<sup>[34]</sup> Ultimately, on April 28, 1998, the complaint was dismissed by the Pine County Attorney's Office for the stated reason that they had been informed by the Zoning Office that Mr. Brant, ". . . did have a permit to excavate."<sup>[35]</sup>

25. The Brants called Mr. Mueller and arranged a meeting on the property. The Brants were there, as was Mr. Mueller, Officer Jensen, and Richard LaPierre of DNR's Hinkley Fisheries office. They discussed the requirement for 75 feet of fill on both sides of the creek bed; the Brants asked whether that could be cut in half. After consulting with the Area Fisheries Manager, the DNR officials agreed to the change. Mr. Mueller confirmed the agreement in a letter of November 12, 1997.<sup>[36]</sup> The letter included some other requested conditions related to the restoration, said the Brant's could begin immediately if they agreed, and invited Mr. Brant to contact him if there were any questions.

26. A few weeks later, Mr. Haik, representing the Brants, call Mr. Mueller and asked to have another meeting. Meanwhile, Barr engineering was retained to work on the issue for the Brants. On January 13, 1998, Robert Obermeyer of Barr Engineering sent Mr. Mueller a letter stating that their survey of the site indicated that the "hydrologic flow in the project area was not significantly changed," and suggesting two alternatives for addressing concerns about current conditions at the site."<sup>[37]</sup>

27. A meeting did occur at the site in February, 1998. The exact date is not clear from the record. It was after the twelfth, because Barr representatives presented a



survey drawing dated February 12, 1998, to the participants.<sup>[38]</sup> Mr. Mueller, the Brants, Mr. Haik, and Barr representatives were there. The Barr representatives laid out their proposal, which was to restore the bank of Spring Creek in three locations with eight foot berms that would completely separate Spring Creek from the ponds. The Barr drawing shows one of the areas to be near the center of the peninsula facing the north pond. The other two areas amount to extending the peninsula to connect to the area of the culvert on the east end and restoring the banks on both sides of the stream bed there.<sup>[39]</sup> Mr. Mueller did not think the proposal would be adequate, but told Mr. Brant to go ahead with that much anyway. After the meeting, Mr. Mueller consulted with Roger Hugill, the Area Fisheries Supervisor, about the adequacy of the Barr proposal. Mr. Hugill found it inadequate.<sup>[40]</sup>

28. Mr. Mueller and Mr. Hugill returned to the site about April 6, 1998, to see if any restoration had been done. It had not. Mr. Mueller decided to recommend that a restoration order be issued and began the process of doing so. He had to enlist the help of several DNR people in the process.

29. After the misdemeanor charge was dismissed on April 28, 1998, Mr. Brant had the spoil piles graded down and seeded the area as had been recommended by the Pine County SWCD. He thought he was done with the matter at that point.

30. On May 3, 1999, DNR issued the Findings of Fact and Order at issue in this matter (the Restoration Order).<sup>[41]</sup> The Restoration Order was issued without prior hearing pursuant to Minn. Stat. § 103G.251, subd. 2. The Brants duly demanded a hearing, also pursuant to Minn. Stat. § 103G.251, subd. 2. The Notice of and Order for Hearing was issued August 30, 1999.

31. The Restoration Order included the following allegations, among others:

- a. Because the ponds were excavated to a depth approximately three feet lower than the bottom of the stream, the streamflow is depleted and still would be excessively depleted if a buffer strip of less than 50 feet were installed on each side of the stream.
- b. Because of the open area of the ponds and removal of streamside vegetation, the temperature of the water in the stream was elevated and such higher water temperatures are harmful to trout and favor the presence of undesirable fish species.
- c. The excavation of the ponds into and adjacent to Spring Creek has caused degradation of a coldwater fishery through warming and elimination of overhead shading and instream habitat.
- d. Replacement of minimal amount of soil adjacent to the stream as proposed by Barr in the February 12, 1998, plan would not restore the fisheries habitat that had been lost, would not prevent subsurface seepage from the channel, and would not prevent thermal degradation of the trout stream.

32. The Restoration Order ordered the Brants to restore the stream by filling in the ponds and seeding the area, not to remove any existing willow or alder vegetation, to place a sediment barrier over the culvert, to complete the restoration by July 30, 1999, to pay a \$100 field inspection fee, and to notify Mr. Mueller when the project was completed so a return inspection could be completed.

33. Barr Engineering conducted surveys and data analyses in the summer of 1999 to determine the impact of the ponds upon water temperatures and stream flow. These studies showed that while the water temperature increased in the ponds, the temperature declined as the stream flowed downstream and by a mile downstream from the ponds returned to about the same temperature as existed in the stream upstream of the ponds. As to water flow, they showed that because the ponds were now essentially level with the stream, and groundwater was flowing into the ponds and then into the stream, there was actually an increase in streamflow below the ponds. Moreover, as to the entire watershed, there was no net loss of water, except for a minimal amount due to evaporation from the pond surfaces, because all the water in the ponds that didn't flow directly into the stream would flow as groundwater generally downstream until it did enter the stream.

34. Rather than creating the ponds that he did, there were several alternatives available to Mr. Brant for creating a wildlife pond on the Brant Property that would not have connected to Spring Creek and that would not have had the significant impact upon Spring Creek that the ponds now have. Making the north pond smaller and setting it back from the stream 25 feet, and not digging the south pond, as Mr. Mueller had directed, is the most obvious alternative. The ponds could have been dug in other areas on the Brant Property away from the stream.

35. The Brants have suggested only one method of restoration in this proceeding. That is to leave things as they are.<sup>[42]</sup> To leave the ponds in the stream as they are will continue to harm Spring Creek and interfere with its use as a trout stream.

Based upon the foregoing facts, the Administrative Law Judge makes the following:

### **CONCLUSIONS**

1. The Administrative Law Judge and the Commissioner of Natural Resources have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50 and 103G.251

2. Spring Creek is a designated trout stream and, as such, is a protected public water pursuant to Minn. Stat. § 103G.005, subd. 15 (a)(10).

3. Under Minn. Stat. § 103G.245, subd. 1 (2), a public waters work permit from the DNR is required to change, or diminish the course, current, or cross section of public waters by any means, including excavation.

4. The excavation of the wildlife ponds in and adjacent to Spring Creek by the Brants in September of 1997 changed and diminished the course, current, and cross



section of Spring Creek, was done without a public waters work permit, and was therefore a violation of Minn. Stat. § 103G.245, subd. 1.

5. Because the excavation was done without a public waters work permit in violation of Minn. Stat. § 103G.245, subd. 1, the Commissioner may order restoration of the stream to its condition prior to the excavation. The restoration required by the Restoration Order reasonably does so.

6. Where a permit is not obtained prior to work in public waters, it is the practice to allow the person, in effect, to apply for an after-the-fact permit.<sup>[43]</sup> That person must demonstrate that the completed project meets all requirements for issuance of a permit. In this case, the Brants have not requested an after-the-fact permit, but have argued instead that no restoration is necessary because restoration will not provide any improvement to Spring Creek from the current conditions. They have proposed no alternative methods of restoration for consideration here. It is appropriate to apply the same permit requirement analysis to the Brants' argument, that is, they must demonstrate that the current conditions meet all the requirements for issuance of a permit.

7. The current conditions do not meet the requirements for issuance of a permit in several regards, namely:

a. The current conditions do not address and satisfy the goals of limited excavation set out in Minn. Rule 6115.0200, subp. 1, in that they do not preserve the natural character of protected waters in order to minimize damage to the environment, exceed the capability of the stream to assimilate the excavation, and fail to protect and preserve the stream from sedimentation and other adverse physical and biological effects.

b. The current conditions constitute nonpermitted excavation under Minn. Rule 6115.0200, subp. 3 C, in that they are detrimental to significant fish habitat, and feasible mitigation is available.

c. The current conditions do not satisfy several criteria set forth in Minn. Rule 6115.0200, subp. 5, in that they do not represent the "minimal impact" solution, are not limited to the minimum dimensions necessary for creating a wildlife pond, do not affect the biological character of the stream to the minimum degree feasible, and do not mitigate adverse affects upon the stream.

d. The current conditions do not satisfy Minn. Rule 6115.0201, subp. 6, which applies specifically to excavation in designated trout streams, in that they result in increased water temperatures, cause excessive sedimentation in the stream, destroy fish habitat, and there are feasible alternatives to the current conditions, namely, some form restoration of the stream.

8. The Brants have failed to demonstrate that the alternative of doing no restoration complies with the requirements applicable to their excavation of Spring Creek.

9. While no serious alternatives to the almost complete restoration ordered by the Restoration Order were presented by the Brants at the hearing, some alternatives were discussed. Those include the options previously presented to the Brants by Mr. Mueller and the offer of DNR restoration experts to help design an appropriate restoration for the stream short of filling in both ponds. It is appropriate to encourage serious discussion of reasonable alternatives by the Brant and DNR staff.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

### **RECOMMENDATION**

**IT IS HEREBY RESPECTFULLY RECOMMENDED** that the Commissioner of Natural Resources order that the Restoration Order be **AFFIRMED** and that enforcement of the Order be stayed a reasonable period to allow the parties to negotiate a modified restoration plan.

Dated this 30th day of December, 1999.

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STEVE M. MIHALCHICK  
Administrative Law Judge

### NOTICE

Pursuant to Minn. Stat. §14.62, subd. 1, the Agency is required to serve a copy of its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Tape recorded: 20 hearing tapes, 4 motions tapes.

### MEMORANDUM

The Brants argue that restoration is not appropriate when there are no effects to mitigate, citing *In Re Bartell*, 284 N.W.2d 834, 839 (Minn. 1979). The Court there noted that during the passage of time it took the case to reach the Court, conditions had changed that may have rendered the case moot, but they remanded it anyway. The conclusions here are based on the conditions as they existed a few weeks ago and there's no evidence they'll get better over time. If anything, there will be continued erosion of the little remaining stream bed. The Brants cite *In Re Kaldahl*, 418 N.W.2d 532 (Minn. App. 1988) for the proposition that restoration for the sake of punishment is not allowed. The case actually held that dismissal of a criminal charge for altering public waters without a permit does not require dismissal of the Department's restoration order. The Court stated:

The Commissioner's restoration order clearly is remedial in nature because it does nothing more than order an unlawfully altered cross-section of public water restored to its previous condition. See Minn. Stat. Secs. 105.461-.462 (the Commissioner may issue restoration orders ordering individuals "to take any action necessary to restore the public waters or beds thereof to the condition existing before unlawful activities, if any, were undertaken"). The Commissioner's authority to order restoration of altered waters and cross-sections is not necessarily conditioned on criminal liability; the Commissioner only need determine whether public waters were altered without a permit. See, Minn. Stat. Sec. 105.462.

Since the enforcement order and the authorizing statute are remedial in nature and not punitive, enforcement of the order will not subject Kaldahl to double

jeopardy even though he was acquitted of criminal charges based on the same operative facts.<sup>[44]</sup>

It is clear in this case that the excavation by the Brants has dramatically altered Spring Creek. Where there was once a one to three foot wide stream running through deep grasses and brush, there is now a 480 by 100 or more foot wide pond with a narrow peninsula. The stream no longer exists where the pond exists. And while the temperature in the stream returns to upstream temperatures at some point downstream and there is minimal net water loss to the watershed, it cannot be concluded that these effects are minimal or that they are the only effects. The water from the ponds, heated, full of algae and sediment, low in oxygen, and containing different food supplies, flows directly into the stream and down to the areas that trout are found. If it had not been heated, it would have been even cooler downstream. Trout may have been able to survive farther upstream than they do now. Until the ponds filled up to the level of the ground water, they were lower than the stream and water was lost from the stream to the ponds. The legislature has given high priority to preserving the few trout streams that exist in Minnesota. The Brants' pond as it now exists is not consistent with that priority and not allowed by the rules implementing the legislative intent.

To some degree, it is possible to empathize with Mr. Brant's plight. He asked what permits he needed and got the one he was told to get. The DNR requirements are not clear. Mr. Mueller did not put in writing his requirement to stay back at least 25 feet. The County Zoning Administrator issued a Grading and Filling Permit based on a drawing that showed the pond being dug right up to the stream itself. There was already a small pool by the culvert that was having some of the same impacts, but to a lesser degree.

But it is not possible to believe that Mr. Brant did not understand that he had to stay back a significant distance from the stream or the banks would collapse into his ponds. He was a farmer and did road construction. Surely he was familiar with the local soils and knew that a three or four foot strip would collapse, or at least leak significantly. Despite his denials, he knew it was a trout stream—he had a letter from the County saying so. He knew that Mr. Mueller had told him to stay back 25 feet. He saw what was happening or was informed when Mr. Irons dug away the parts of the walls of the stream. He went beyond what even the Grading and Filling Permit from the County allowed when he decided to add the pond to the south. Had he informed DNR originally that he was going to surround Spring Creek with two ponds just a few feet away, they would have stopped the process immediately.

There may be some alternatives to completely filling in the ponds. For example, just filling in the south pond and rerouting the stream along the southern edge may be reasonable. Along with that, perhaps the culvert, for which the Brants are not responsible, can be relocated or resized to allow the stream to flow without backing up. The parties should seriously negotiate the restoration options.

S.M.M.

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<sup>[1]</sup> See, e.g. Ex. 290.

<sup>[2]</sup> Ex. 6.

<sup>[3]</sup> Ex. 200.

<sup>[4]</sup> Ex. 310.

<sup>[5]</sup> Ex. 26, finding 3, Ex. 28, slide 18.

<sup>[6]</sup> Exs. 5, 6, and 7.

<sup>[7]</sup> Exs. 5 and 6.

<sup>[8]</sup> Ex. 8.

<sup>[9]</sup> Ex. 10.

<sup>[10]</sup> Exs. 6 and 8.

<sup>[11]</sup> Exs. 294 and 320.

<sup>[12]</sup> Exs. 3 and 201.

<sup>[13]</sup> Id.

<sup>[14]</sup> Ex. 201.

<sup>[15]</sup> Exs. 301, 302, 303.

<sup>[16]</sup> Mr. Brant testified that he does not recall talking to Mr. Mueller on September 25, 1996, although he may have. He denies being told to stay back 25 feet. The ALJ credits Mr. Mueller's recollection on this point.

<sup>[17]</sup> Exs. 4 and 202.

<sup>[18]</sup> Ex. 202.

<sup>[19]</sup> Ex. 333.

<sup>[20]</sup> Exs. 18 and 218.

<sup>[21]</sup> Exs. 18 and 19.

<sup>[22]</sup> Exs. 20 and 22

<sup>[23]</sup> Ex. 21.

<sup>[24]</sup> Ex. 22.

<sup>[25]</sup> Ex. 290.

<sup>[26]</sup> Id.

<sup>[27]</sup> Ex. 12.

<sup>[28]</sup> Ex. 219.

<sup>[29]</sup> Ex. 12.

<sup>[30]</sup> Exs. 12 and 290.

<sup>[31]</sup> Ex. 290.

<sup>[32]</sup> Exs. 12, 221, 222, and 231.

<sup>[33]</sup> Ex. 203.

<sup>[34]</sup> Ex. 24.

<sup>[35]</sup> Ex. 25.

<sup>[36]</sup> Ex. 204.

<sup>[37]</sup> Ex. 205.

<sup>[38]</sup> Ex. 12.

<sup>[39]</sup> Id.

<sup>[40]</sup> Exs. 206 and 207.

<sup>[41]</sup> Ex. 26.

<sup>[42]</sup> Brant Pretrial Memorandum at 13.

<sup>[43]</sup> See, e.g., *Matter of Eigenheer*, 453 N.W.2d 349, 352-354 (Minn. App. 1990).

<sup>[44]</sup> *In Re Kaldahl*, 418 N.W.2d, 536 (Minn. App. 1988).